Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

CELLEXIS INTERNATIONAL, INC.,	)	
Complainant,	)	
v.	)	File No. E-_____
BELL ATLANTIC NYNEX MOBILE SYSTEMS, INC.	)	
and	)	
CELLCO PARTNERSHIP	)	
and	)	
WASHINGTON D.C. SMSA LIMITED PARTNERSHIP	)	
Defendants.	)	

EMERGENCY MOTION FOR TEMPORARY RELIEF

I. INTRODUCTION

The Complainant, Cellexis International, Inc. ("Cellexis" or "Complainant") provides interstate and intrastate prepaid cellular service to credit-impaired customers

in the Washington D.C. - Baltimore area by interconnecting its switch to Defendants', Bell Atlantic NYNEX Mobile Systems, Inc., Cellco Limited Partnership and Washington D.C. SMSA Limited Partnership (collectively "BANM" or "Defendants") network via a T-1 line. This switch allows Cellexis to verify that its customers have sufficient funds to place the call, eliminating the credit risk. BANM has now decided to terminate Cellexis' interconnection on February 19, 1997 so it can promote its own new $1.00 per minute prepaid service after it eliminates competition from Cellexis' service -- which, at $.49 per minute peak, $.39 per minute off-peak, is less than half the BANM price.[1/]

Given the imminence of BANM's deadline, and the irreparable injury that Cellexis will suffer should BANM proceed with its plans to disconnect it, Cellexis, pursuant to 47 U.S.C. § 154(i) and 47 C.F.R. § 1.46(d), hereby requests emergency temporary prohibiting BANM from terminating Cellexis' interconnection with BANM's network until the Commission determines whether such proposed termination is lawful. To that end, Cellexis is filing a Formal Complaint concurrently with this Motion.

II. FACTS

Cellexis, based in Phoenix, Arizona, is a switched-based reseller, offering intrastate and interstate prepaid cellular service through BANM's network. From 1987

[1/] All new subscribers are offered Cellexis' $0.49 peak/$0.39 off-peak rates. Some existing customers remain subscribed under plans at higher rates. Peak times are Monday through Friday, 7:00 a.m. to 9:00 p.m., excluding some major holidays. Activation, programming and monthly access fees apply.

until 1996, Cellexis was an authorized agent for Bell Atlantic NYNEX Mobile and its predecessor, Bell Atlantic Mobile ("Bell Atlantic") in the Southwest Region.[2/]

In the course of selling cellular phone service, Cellexis' founder, Douglas V. Fougnies, noticed that between 20 and 25 percent of the applicants for cellular phone service did not meet the credit criteria established by the carrier. These applicants effectively were precluded from having cellular telephone service. In response to this perceived market need, Mr. Fougnies, in early 1993, developed the proprietary technology and system which allows customers to pre-purchase airtime. This prepaid cellular phone system eliminates the credit risk associated with standard cellular service, and thus enables millions of credit-impaired members of the public to receive cellular service. It also meets the needs of others, such as businesses, who wish to limit the cellular calls of its employees, and those who wish to reduce the risk of cellular "roamer" fraud.

To operate the Cellexis System, Cellexis must enter into an arrangement with a carrier in each market which allows access to local cellular phone numbers and airtime. Such an agreement was first reached with Bell Atlantic in the fall of 1993, when Bell Atlantic's representatives approved Cellexis' first product, a cellular phone with a chip installed that would shut off the phone when the prepaid airtime had run out. Cellexis introduced this phone into the Phoenix market in early 1994.

[2/] Unless otherwise indicated, the facts set forth in this Motion are verified through the attached Affidavit of Douglas Fougnies (Exhibit 8).

Subsequently, Cellexis developed a system which did not require any modifications to the cellular phone itself. Bell Atlantic's representatives verbally approved first the analog, and then the digital, versions of this system for use in the Southwest region in connection with Bell Atlantic's "Mobile Direct" product, through which defendant permitted businesses to interconnect PBXs with BANM's network in a manner (*i.e.*, through a "fixed use T-1 line") that is virtually identical to the Cellexis System. With Bell Atlantic's knowledge and agreement, Cellexis installed and tested its T-1 line, and put its System into service in the Southwest. Cellexis initiated this service under its existing agency contract with Defendant.

In late 1994 and early 1995, at the same time that Cellexis was introducing its System in the Southwest, it had several discussions with Bell Atlantic about the possibility of forming a strategic alliance. During that time, Bell Atlantic conducted a "due diligence review" of the Cellexis System operation. During these discussions, Bell Atlantic representatives suggested the Washington-Baltimore area as a logical market for the Cellexis System, and stated that if Cellexis wanted to enter that market it should do so as a Bell Atlantic Reseller. Pursuant to this suggestion, On March 6, 1995, Cellexis submitted to Bell Atlantic an Application for Reseller Status, together with a copy of Cellexis' business plan for prepaid cellular service.

On April 11, 1995, Bell Atlantic sent a letter to Cellexis approving its reseller status for the Washington/Baltimore areas, provided Cellexis supplied a $150,000 certificate of deposit and two executed copies of Bell Atlantic's standard

Wholesale Service Agreements for the two areas. These Agreements were drafted by Bell Atlantic without any input from Cellexis as to any of the contract's terms, except for the economic provisions.

Cellexis submitted the executed the Wholesale Service Agreements and the certificate of deposit to Bell Atlantic in June 1995. Subsequently, on June 12, 1995, Bell Atlantic activated the Cellexis System in the Tucson area, which system included the fixed use T-1 line. Bell Atlantic and Cellexis then entered into discussions concerning Cellexis' introduction of prepaid cellular service in the Baltimore/Washington areas. BANM itself executed the Wholesale Service Agreements in November 1995. It did so fully aware of the Cellexis' system requirements and the feasibility of Cellexis' interconnection needs.

Almost immediately after BANM executed the Washington-Baltimore Agreements, it sought to significantly alter their terms. BANM attempted to limit the scope of the Agreements to a 90 day "trial period" through an addendum. While Cellexis was more than willing to work with BANM to accommodate any reasonable internal requirements stemming from the Bell Atlantic/NYNEX merger of cellular operations, it was not willing to agree to eviscerate the contracts it had just negotiated at BANM's suggestion. When Cellexis refused to capitulate, BANM advised Cellexis that it was terminating Cellexis' right to use its System in the Washington-Baltimore area. Cellexis promptly brought suit in the U.S. District Court for the District of Columbia.

In an effort to end this dispute, On February 20, 1996 Cellexis entered into a Memorandum of Understanding with BANM. Pursuant to this Memorandum of Understanding, Cellexis further entered into a Service Trial Agreement (the "Agreement") with BANM which specifically permits Cellexis to interconnect its switch with the BANM network through a T-1 line in order to provide prepaid cellular service to its customers in the Washington, D.C. and Baltimore, Maryland metropolitan areas.[3/] Cellexis has thus been interconnected to BANM's network, with no adverse economic or technical impact on BANM, for almost a year.

On October 11, 1996, Defendant notified Cellexis that it intended to terminate the Trial Agreement on February 19, 1997, the earliest date possible under the Agreement.[4/] Defendant has offered no explanation for its decision, and has to date refused Cellexis' efforts to open discussions. On December 16, 1996, Defendant responded to Cellexis' most recent letter of December 5, 1996 requesting an extension of the existing interconnection arrangement. In its response, Defendant reiterated its intent to disconnect Cellexis and asserted that this disconnection did not violate the Communications Act or Commission policy.

Cellexis' efforts to make other interconnection arrangements have been equally unsuccessful. For example, Cellexis has recently filed a complaint against

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[3/] See Service Trial Agreement (Exhibit 1).

[4/] See Letter to Douglas Fougnies and J. Douglas Dunipace, Esq. from Katherine S. Abrams (Oct. 11, 1996) (Exhibit 2).

Southwestern Bell Mobile Systems for denial of interconnection.[5/] Efforts to negotiate an agreement with Sprint Spectrum have similarly failed. Thus, BANM's network is the only one available to Cellexis at this time in the Washington-Baltimore area.

Defendant continues to offer its "Mobile Direct" product, through which businesses interconnect PBXs with BANM's network in a manner (*i.e.*, through a "fixed use T-1 line") that is virtually identical to the Cellexis System.[6/] Exhibit 5 is a BANM Mobile Direct marketing brochure that illustrates this BANM program.

In the Fall of 1996, Bell Atlantic NYNEX Mobile began offering its own prepaid cellular service plan, Mobile Minutes, in the Washington-Baltimore area by allowing its distribution arms in Washington, D.C. (Washington D.C. SMSA Limited Partnership) and Baltimore (Cellco Partnership) to interconnect to the BANM network. Defendant's Mobile Minutes program charges $1.00 a minute (Exhibit 6), more than double Cellexis' rate of $0.49 per minute peak, $0.39 per minute off-peak (Exhibit 7).

III. THE COMMISSION HAS THE AUTHORITY TO ISSUE A TEMPORARY ORDER TO PRESERVE THE STATUS QUO

The Commission clearly has the authority under Section 4(i), 47 U.S.C. § 154(i), and 47 C.F.R. § 1.46(d), to issue an order granting temporary relief. The Supreme Court expressly confirmed that Section 4(i) authorizes the Commission to

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5/ See Cellexis International, Inc. v. Southwestern Bell Mobile Systems, Inc., Informal Complaint No. WB/ENF 961148 (Aug. 12, 1996).

6/ Compare Exhibit 3, which illustrates a typical PBX interconnection offered by BANM with Exhibit 4, which illustrates Cellexis' interconnection.

order interim relief pending resolution of a matter in U.S. v. Southwestern Cable Co. In that case, the Supreme Court upheld the Commission's ability to prohibit respondents carriage of signals outside their service area pending appropriate hearings.[7] In affirming the Commission's authority to grant temporary relief, the Court held:

> [The Commission] has found that the . . . public interest demands "**interim relief** . . .limiting further expansion," pending hearings to determine appropriate Commission action. **Such orders do not exceed the Commission's authority**. This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the dynamic aspects of radio transmission, and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details . . ." **Thus, the Commission has been explicitly authorized to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i)**. In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act.[8]

Thus, it is well settled that the Commission has the authority to issue such interim relief to preserve the status quo until it can determine whether the Communications Act and the Commission's own policies and rules are being violated.

More recently, the Commission granted a petition for emergency relief filed by Southern New England Telephone Company ("SNET") requesting that the Commission require the North American Numbering Plan Administrator ("NANPA") to

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[7] United States et al. v. Southwestern Cable Co., 392 U.S. 157 (1968) .

[8] Id. at 1180-81 (emphasis added; additional internal citations omitted).

honor SNET's request for certain "800-555" numbers on a non-discriminatory basis to protect competition:

> We believe that a compelling reason to [grant the requested emergency relief] involves the promotion of competition in the market for Directory Assistance. We have previously encouraged competitors to enter the toll free Directory Assistance market, and the parties requested the disputed 800-555 numbers have indicated they will use the numbers for that purpose. To hold the numbers in abeyance any longer will delay the development of a competitive Directory Assistance market.[9/]

Such competitive concerns are clearly at issue here. As the following discussion will show, the emergency relief requested by Cellexis is essential not only to prevent irreparable injury to Cellexis, but to ensure that the market for prepaid cellular services in the Washington-Baltimore market remains competitive pending Commission consideration of the complaint.

IV. CELLEXIS' REQUEST FOR EMERGENCY INTERIM RELIEF IS NECESSARY PREVENT IRREPARABLE HARM TO CELLEXIS AND TO PROTECT THE PUBLIC INTEREST

Cellexis' request for emergency interim relief meets each of the established four criteria for granting emergency relief: (1) the petitioner is likely to prevail on the merits; (2) the petitioner will suffer irreparable harm if the requested relief is not granted; (3) other interested parties will suffer little, if any, harm if the relief is

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9/ In the Matter of Southern New England Telephone Company expedited Petition for Emergency Interim Relief, Preliminary Injunction and Stay, 10 FCC Rcd 13194, 13197 (1995).

granted; and (4) the granting of relief is in the public interest.[10/] The following sections address each of these criteria, in turn.

A. Cellexis is Likely to Prevail on the Merits

BANM's decision to summarily shut off Cellexis' interconnection is a blatant violation of three key provisions of the Communications Act. **First**, BANM's decision violates section 202(a), which prohibits discriminatory actions. **Second**, BANM's decision violates Section 251(a)'s express interconnection requirement, which applies broadly to all telecommunications carriers, including CMRS providers. **Third**, BANM's decision is also unjust and unreasonable in violation of Section 201(b). As the following discussion demonstrates, these statutory provisions clearly preclude BANM from refusing to maintain Cellexis' reasonable interconnection arrangement.

1. BANM's Refusal to Continue Cellexis' Interconnection is Discriminatory

BANM's refusal to allow Cellexis to interconnect to provide prepaid services is unlawful discrimination both because BANM itself interconnects equipment to its system to provide prepaid services, and because BANM allows other third parties to interconnect to the mobile telephone switching office ("MTSO").

Section 202(a) of the Communications Act states:

[10/] Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). See also Washington Metropolitan Area Transit Authority v. Holiday Tours Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[11/]

This provision protects all classes of persons against all types of discriminatory behavior. As discussed immediately below, BANM's decision to disconnect Cellexis discriminates against a class that the Commission has been particularly vigilant in protecting: resellers.

BANM's decision to cut-off Cellexis' access from its system discriminates against Cellexis as a reseller. The Commission, in removing AT&T's restrictions on the resale of public switched lines stated: "discrimination against a communications customer -- in this case, by the carrier's refusal to provide service to a reseller -- is unlawful if it is based only upon the fact that the customer is not the ultimate user of the service,"[12/] *i.e.*, because the customer is a reseller. In the cellular context, the Commission has already translated this prohibition on discrimination into an affirmative obligation. Specifically, the Commission's cellular resale policy requires cellular providers (and particularly BOC-affiliated providers) to: "provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and **on the same**

11/ 47 U.S.C. § 202(a).

12/ In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 F.C.C. 2d 167, 173 (1980) ("Resale and Shared Use").

terms and conditions as its own distribution arm."[13/] The Commission has further clarified that "terms and conditions" means that all licensees must be willing to provide "substantially similar service to similarly-situated customers."[14/]

BANM's decision violates this non-discriminatory service requirement in two respects. **First**, Bell Atlantic NYNEX Mobile, through its "distribution arms" in Washington, D.C. (Washington D.C. SMSA Limited Partnership) and Baltimore, Maryland (Cellco Partnership), has recently begun distributing its own prepaid cellular program. BANM describes this new Mobile Minutes program as "The Prepaid Cellular Calling Service that allows you to pay as you go."[15/] BANM's ad reveals its discriminatory purpose: to exclude Cellexis as a prepaid cellular service. Indeed, BANM will have to eliminate competition from Cellexis at $.49 per minute during peak times, $.39 per minute off-peak, in order to charge $1.00 per minute for its own service.

Of course, the Commission's resale policy is designed to protect consumers by providing for just this kind of vigorous competitive check. BANM must "provide system capacity to non-affiliated retailers or resellers [, such as Cellexis,] on a non-discriminatory basis and on the same terms and conditions as its own distribution

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13/ In the Matter of Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications System, 86 F.C.C. 2d 469, 511 (1981) ("Cellular Resale Decision") (emphasis supplied). See also Cellnet Communications v. Detroit SMSA, 9 FCC Rcd 3341, 3344 (1994) ("The Commission's cellular resale requirement . . . applies to the defendant regardless of its current organizational structure.").

14/ Cellnet Communications v. Detroit SMSA, 9 FCC Rcd at 3344.

15/ See BANM's Mobile Minutes brochure at Exhibit 6.

arm." Here the "same terms and conditions" include interconnection of a switch to permit provision of prepaid service.[16/] Thus, if BANM offers a prepaid cellular program in the Washington-Baltimore area by allowing its own distribution arms to interconnect a switch to the networks, then it must allow Cellexis to do the same.

Second, BANM provides similarly-situated customers with the same type of switch interconnection over a T-1 line that Cellexis seeks. For example, BANM's Mobile Direct program permits private businesses to interconnect with BANM's network in a manner that is virtually identical to Cellexis' request. As BANM's own marketing brochure states, Mobile Direct routes calls "over a dedicated circuit [the] company provides between the local Bell Atlantic Mobile Switching Center [and the] company's PBX or Centrex."[17/] More specifically, as the diagram in Exhibit 3 demonstrate, BANM allows businesses to connect their PBX switches with BANM's network, through T-1 cables, at a point between the MTSO and the local telephone company's central office ("CO"). An incoming call is routed through the MTSO (if a cellular phone is used) or the CO (if a wireline phone is used) to the customer's PBX or Centrex switch. The BANM customer's PBX or Centrex switches the call and sends it forward. In the case of

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16/ Cellular Resale Decision, 86 F.C.C. 2d at 511.

17/ Exhibit 5 at 4. A "PBX" is a private branch exchange, which is defined as "[a] private switching system serving an organization, business, company, or agency, and usually located on a customer's premises." The Information Age Dictionary, 226 (1992). A "Centrex" is "[a] service for business customers that shifts to a central-office switching system the functions usually associated with a private branch exchange (PBX) on a customer's premises." Id. at 45.

a call-forwarding function, the call would be sent out again, either through the MTSO or the CO, to the designated number.

The Cellexis switch is also interconnected with BANM's network, through a T-1 cable, at a point between the MTSO and the CO, as shown in Exhibit 4. Calls are processed in precisely the same way. Incoming calls reach Cellexis' switch via either the MTSO or the CO. The switch then verifies that there is sufficient funds in the account to pay for the call and then sends it forward, again either through the MTSO or the CO, to the dialed number. Thus, the Cellexis switch is interconnected in precisely the same way as the private PBX switches.

The only distinction between the Cellexis switch and BANM's Mobile Direct interconnections is that Cellexis is BANM's most threatening competitor in the Washington-Baltimore prepaid cellular market. Not surprisingly, BANM wants to promote its $1.00 per minute service by cutting off Cellexis' interconnection, which provides competition at less than half the price. Such an anti-competitive motivation is an invalid basis for discrimination and is utterly at odds with Commission policy and goals.

2. BANM's Decision to Cut-Off Cellexis Interconnection Violates Section 251(a)'s Express Interconnection Requirement

BANM's decision to cut-off Cellexis violates Section 251(a)'s express interconnection requirement. Congress, in the Telecommunications Act of 1996, added Section 251(a), which states that "[e]ach telecommunications carrier has the **duty to**

interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ."[18/]

The Commission's Interconnection Order, confirms that "all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a)."[19/] As the Commission has already concluded, Section 251(a) imposes a mandatory and unqualified interconnection requirement on all CMRS providers. Indeed, "even for telecommunications carriers with no market power, **the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives**."[20/]

The obligations of Section 251(a) could not be more clear. All CMRS providers must interconnect with the facilities and equipment of others who provide telecommunications services. BANM and Cellexis, as providers of cellular service, are CMRS providers.[21/] BANM therefore must permit other CMRS providers, such as Cellexis, to interconnect their equipment with the BANM network.

18/ 47 U.S.C. § 251(a) (emphasis supplied).

19/ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 at ¶ 993 (rel. Aug. 8, 1996) ("Interconnection Order").

20/ Id. at ¶ 997 (emphasis supplied).

21/ "CMRS" is "any mobile service. . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Section 332(d)(1).

Congress enacted Section 251(a) well after the Commission's rulemaking on cellular resale and interconnection discussed in the next section.[22/] Regardless of the Commission's tentative position in that proceeding, there can be no doubt that this new statutory provision requires defendant to permit Cellexis to interconnect its equipment to the BANM network.

3. BANM's Refusal to Continue Cellexis' Interconnection is Unjust and Unreasonable

In addition to being unlawful under Sections 202(a) and 251(a), BANM's refusal to continue Cellexis' interconnection is unjust and unreasonable in violation of Section 201(b). Section 201(b) of the Communications Act states:

> All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, **and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful** . . .[23/]

In interpreting this section, the Commission continues to adhere to the statutory-based standard first enunciated by the D.C. Circuit in Hush-A-Phone: a carrier cannot establish a restriction which amounts to "an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are

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22/ In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Notice of Proposed Rulemaking, 10 FCC Rcd. 10666 (1995).

23/ 47 U.S.C. § 201(b).

privately beneficial without being publicly detrimental."[24/] This standard has been used not only to protect a telephone subscriber's rights, but also competitors' rights.

As the Commission has stated: "Our past decisions introducing competition into other telecommunications markets have rested on this test."[25/] Accordingly, the Commission has used the Hush-A-Phone principle not only to remove AT&T restrictions against interconnection of customer-supplied terminal equipment and private communications systems,[26/] but also to prohibit restrictions (and thus promote competition) on the resale of private lines, public switched lines, and, significantly, the sale of cellular services.[27/] In the latter case, the Commission determined that

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24/ Hush-A-Phone Corp. v. U.S., 238 F.2d 266, 269 (D.C. Cir. 1956) ("Hush-A-Phone").

25/ Resale and Shared Use, 83 F.C.C. 2d at 171.

26/ Carterfone v. AT&T, 13 FCC 2d 420 (1968), recon. denied, 14 FCC 2d 605 (1968), recon. 18 FCC 2d 871 (1969); American Telephone and Telegraph Company Interconnections with Private Interstate Communications Systems, 71 F.C.C. 2d 1 (1979); In the Matter of American Telephone and Telegraph Company Restrictions on Interconnection of Private Line Services, 60 F.C.C. 2d 939 (1979); Heritage Village Church and Missionary Fellowship, Inc., 85 F.C.C. 2d 787 (1981), 88 F.C.C. 2d 1436 (1982), aff'd sub nom. Fort Mill Telephone Co. v. FCC, 719 F.2d 89 (4th Cir. 1983).

27/ Resale and Shared Use, 83 F.C.C. 2d at 171; In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C. 2d 261 (1976); Cellular Resale Decision, 86 F.C.C. 2d at 511 (The Commission's decision was, by reference to its Resale and Shared Use decisions, based in part on Hush-A-Phone). See also In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408, 5466 (1994) (recognizing the applicability of Hush-A-Phone to cellular services).

mandatory resale was an important step in the "evolution of truly competitive markets."[28/]

One of the more recent Commission decision's interpreting the Hush-A-Phone standard is Public Utility Commission of Texas v. ARCO.[29/] In this decision, the Commission explained that the entity seeking to establish a restriction must factually demonstrate the perceived public detriment. Such a detriment is either "technical harm to the telephone system or economic impact which adversely affects the ability of a carrier adequately to serve the public, or both."[30/]

BANM's decision to disconnect Cellexis cannot meet the Hush-A-Phone standard, for the Cellexis system inflicts no harm -- either technical or economic -- on BANM. That Cellexis' requested interconnection will have no technical impact on BANM is obvious from the fact that Cellexis has been successfully interconnected to the BANM system, with no adverse effects, for almost a year. Similarly, the requested interconnection does not have any negative economic impact on BANM, other than providing competition to its brand new prepaid service. BANM therefore cannot possibly substantiate a claim that Cellexis' request will adversely affect its ability to serve the public.

28/ Cellular Resale Decision, 86 F.C.C. 2d at 511.

29/ Public Utility Commission of Texas v. ARCO, 3 FCC Rcd 3089 (1988), aff'd, 886 F.2d 1325 (1989).

30/ Arco, 3 FCC Rcd at 3091.

BANM also cannot point to the Commission's suggestion in its ongoing rulemaking not to require switched-based resale to support the reasonableness of its position for two reasons. **First**, Congress subsequently enacted Section 251(a), imposing a mandatory and unqualified interconnection obligation on Defendant.

Second, BANM's decision is completely antithetical to the goals and policies expressed by the Commission in this rulemaking. More specifically, the Commission's tentative suggestion not to mandate switched-based resale is predicated on a competitive, rapidly evolving market where reasonable requests are regularly granted without Commission intervention, thus obviating the need to impose a broad interconnection requirement:

> Given the number of competitors we expect to be present in this market in the near future, competitive forces should provide a significant check on inefficient or anti-competitive behavior. This fact suggests that a regulatory mandate to allow switch-based resale may be unnecessary.[31/]

The Commission also noted the uncertainties and costs of requiring CMRS providers to unbundle their services to meet the demands of switched-based resellers, and the administrative complexities of an across-the-board requirement.[32/] At the same time, however, the Commission recognized that these circumstances would not always be present, when it stated: "We note that our tentative conclusions regarding a **general**

31/ Second NPRM at ¶ 96. See also ¶ 43: "We reiterate that the Commission stands ready to intercede in the event a CMRS provider refuses a reasonable request to interconnect."

32/ Second NPRM at ¶ 96.

reseller switch interconnection requirements should not be viewed as prejudging any **specific** complaints filed with respect to this issue."[33/]

This is just such a specific complaint, as all of the circumstances cited by the Commission in support of its decision are clearly inapposite here. In particular, Cellexis is faced with a highly *un*competitive environment: BANM's system is the only one available to Cellexis in the Washington-Baltimore area at this time: efforts to make other arrangements have met similar roadblocks. For example, Cellexis has recently filed a complaint against Southwestern Bell Mobile Systems for denial of interconnection over a T-1 line.[34/] Efforts to negotiate an agreement with Sprint Spectrum have similarly failed.

Further, BANM is not faced with excessive unbundling costs. Given that Cellexis is already connected to the BANM network, BANM will not be faced with any new costs. Moreover, since any costs already incurred were done so in the context of a freely negotiated agreement, they can hardly be characterized as excessive. Finally, Cellexis is not asking the Commission to undertake the administrative burdens associated with imposing a general obligation. Rather, it is merely asking the Commission to do what Congress and its own policies, quoted above, demand: prevent the abuse of market power by a BOC-affiliated CMRS provider to stifle competition and limit consumer choice by cutting off an existing service.

33/ Second NPRM at ¶ 97 (emphasis supplied).

34/ See Cellexis International, Inc. v. Southwestern Bell Mobile Systems, Inc., Informal Complaint No. WB/ENF 961148 (Aug. 12, 1996).

While Cellexis is not requesting that the Commission impose a general requirement, it observes that the benefits of such a requirement may ultimately outweigh the costs. Indeed, as noted above, the competitive environment for switched based resale is no different from non-switched based resale, for which the Commission did decide to impose a mandatory requirement on cellular and other CMRS providers. In imposing this mandatory resale requirement, the Commission itself observed:

> Because cellular, broadband PCS and covered SMR services are not yet provided on a fully competitive basis, we conclude that carriers in these services should, for an interim period, be specifically prohibited from restricting resale or unreasonably discriminating against resellers. Accordingly, we condition existing and future cellular, broadband PCS and covered SMR licenses upon compliance with our resale rule . . .[35/]

The Commission has determined that a mandatory resale requirement is necessary because the cellular service is not yet competitive. This lack of competitiveness affects all resellers, including those that are switched-based. Accordingly, the Commission should at a minimum aggressively enforce a duty not to cut off switched-based resellers where there is not a sufficient number of suppliers to ensure that switch-based reselling opportunities are available.

35/ In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services First Report and Order, CC Docket No. 94-54 at ¶ 7 (rel. June 12, 1996).

B. Cellexis Will Suffer Irreparable Harm if BANM is Permitted to Terminate its Interconnection

Cellexis will suffer irreparable harm if BANM is permitted to terminate its interconnection. As discussed above, neither Cellular One nor Sprint Spectrum has been willing to negotiate an interconnection agreement with Cellexis. Thus, BANM remains Cellexis' only avenue for providing service to its customers. Should BANM shut off Cellexis, Cellexis will have to lay off its employees, terminate business relationships with vendors and disconnect its customers. In short, Cellexis will be completely shut out of the Washington-Baltimore market.

Cellexis has invested heavily in bringing its prepaid service to the Washington-Baltimore area, largely at the suggestion of BANM, and has succeeded in bringing competitively priced prepaid cellular service to the credit-impaired market. If BANM is permitted to shut off Cellexis, Cellexis will lose the products of this investment: a solid business with considerable customer good-will. The loss of these assets are incalculable. Indeed, losing its customer base now will make reentering the market at a later date virtually impossible, as customers will be unwilling to return to a service who has already once been forced to withdraw service. Such a complete loss is at the heart of the "irreparable injury" standard. As the Commission itself has noted: ". . . injuries such as . . . irretrievable loss of business clients. . .will support at stay."[36/] This is just such an injury.

36/ In re Big Valley Cablevision, Inc., 85 F.C.C. 2d 973 (1981). See also Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

C. Other Interested Parties Will Be Helped, Not Harmed

Other interested parties will be helped, not harmed, by a Commission order temporarily preventing BANM from cutting off Cellexis. As discussed above, Cellexis' interconnection does not harm BANM or its ability to serve the public. BANM would merely continue to provide interconnection to, and receive revenues from, Cellexis pursuant to a contract BANM voluntarily entered into. The only conceivable "harm" that BANM can claim is continued competition from a prepaid cellular service that offers airtime at less than half the cost. Such competition cannot possibly be construed as a legitimate harm.

Apart from BANM, the other interested parties are the credit-impaired customers for prepaid service in the Washington-Baltimore area, who will benefit by an order which preserves the availability of a competitive prepaid service. Without the order, these customers will be faced with either losing their prepaid service or paying $1.00 per minute -- double Cellexis' rate. These customers should not be forced to make such an unpalatable choice until the Commission makes a final decision on the merits of this Complaint. Even BANM's customers will benefit by Cellexis' continued operations in the Washington-Baltimore area. If Cellexis is permitted to remain as a competitor, BANM will be forced to reduce its price from the lofty $1.00 per minute level.

D. Cellexis Request Serves the Public Interest by Preserving Competition in the Prepaid Cellular Market

In addition to Cellexis, "competition" in the prepaid cellular market in the Washington-Baltimore area will be a casualty of BANM's decision to terminate Cellexis' interconnection. Credit-impaired customers will be forced to pay more than twice as much to BANM (at $1.00 per minute) than they do to Cellexis (at $.49 per minute peak, $.39 per minute off-peak). A starker illustration of the benefits of preserving competition is difficult to imagine. Thus, to promote the public interest by safeguarding competition in the prepaid cellular market, the Commission should prohibit BANM from terminating Cellexis' interconnection until its Complaint is fully resolved on the merits.

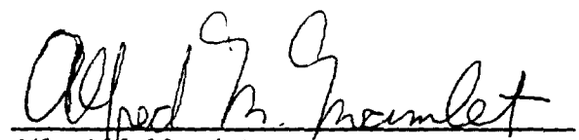
V. CONCLUSION

For the foregoing reasons, Cellexis respectfully urges the Commission to issue the requested order well before the February 19, 1997 deadline BANM has set for terminating Cellexis' interconnection.

Respectfully submitted,

Cellexis International, Inc.

Douglas Fougnies
President and CEO
4615 South Ash Avenue
Suite H-S
Tempe, AZ 85282
(602) 664-1050

By: 

Alfred M. Mamlet
Colleen A. Sechrest
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 200036
(202) 429-3000

Dated: December 20, 1996

CERTIFICATE OF SERVICE

I, Colleen Sechrest, hereby certify that copies of the foregoing were served by hand delivery, unless otherwise noted, this 29th day of April, 1996, on the following persons:

Katherine S. Abrams*
Regional Counsel
Bell Atlantic NYNEX Mobile Systems, Inc.
180 Washington Valley Road
Bedminster, NJ 07921

John T. Scott, III, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

Howard Davenport
Federal Communications Commission
Room 8308
2025 M Street, N.W.
Washington, D.C. 20554

Myron C. Peck
Federal Communications Commission
Room 8308
2025 M Street, N.W.
Washington, D.C. 20554

Gary Schonman
Federal Communications Commission
Room 8308
2025 M Street, N.W.
Washington, D.C. 20554

Colleen Sechrest

Colleen Sechrest

* By Facsimile and Federal Express